March 3, 1982. He said the plaintiff's anxieties cannot be avoided. He admitted that the plaintiff's increment of salary was wrongly stopped by the 2nd Defendant but it was later fully restored by him.

The 2nd defendant states that he conducted investigations against the plaintiff under the powers given to him by law. He admitted that he had stopped the plaintiff's increment of salary which he later realised was not done according to the proper procedure.

While the remaining 3rd, 4th and 5th defendants all deposed that they were acting under lawful orders of the 2nd defendant, the 1st, 2nd and 3rd defendants also maintained that they are immune from suits. No grounds are given.

The plaintiff in his reply of course, gave different views of the matters deposed by the defendants.

The matters raised by both parties in their affidavits are mainly questions of fact to be decided at the trial. There are also propositions of law raised by the plaintiff whether publication in the newspapers on March 2, 1982 alleging his arrest is defamatory and whether the stoppage of his salary was done *bona fide* though the facts have been admitted. The defendants' claim to immunity from suits is also a serious question of law which has to be gone into at trial. I cannot at this juncture usurp the function of a trial judge and deal with these issues summarily.

In my view, the present pleading read as a whole and presuming all the allegations to be true is not a plain and obvious case to strike out as disclosing no reasonable cause of action. Nor are they scandalous or vexatious or an abuse of the process of the Court on the grounds advanced by the Learned Senior Federal Counsel. The application is dismissed with costs.

Application dismissed.

Solicitors : *Subra Naicker & Co.*

SYARIKAT KERJASAMA SERBAGUNA TUNAS MUDA SUNGAI ARA v. GHAZALI BIN IBRAHIM

[O.C.J. (Mohamed Dzaiddin J.) January 9 & 11, 1985]

[Penang – Civil Suit No. 230 of 1979]

Practice & Procedure – Order 14 application – Whether there was a triable defence – Circumstances under which court will allow application.

The plaintiff claimed that the defendant was a trespasser who wrongfully erected the unnumbered premises on part of the plaintiff's land. The defendant denied this in his statement of Defence of July 28, 1979. He averred that he constructed his premises on a portion of land which belonged to his mother. The same averment was repeated in the affidavit of the mother. She stated that she gave consent to the defendant to construct the premises on a portion of her land which she purchased from the plaintiff.

The facts revealed, however, that the land had not been subdivided. From the survey plan made by one Syarikat Ayob, it was found that the defendant's premises was constructed on part or portion of the plaintiff's land. There was nothing to indicate on the survey plan that the said premises was built on the portion which the defendant's mother had alleged to have been alienated to her by the plaintiff. The court also found that the defendant's mother was not the registered proprietor of any of the portion of land belonging to the plaintiff.

Held: (1) this is essentially a case where the triability of the issue depends upon evidence as opposed to law;

(2) from the facts and circumstances of the case as a whole, the court was satisfied that the defendant had failed to show a *bona fide* defence to the claim.

[*Editorial Note:* An appeal has been filed by the defendant against this decision in M.A. Rayuan Sivil No. 66 of 1985].

Case referred to:

(1) *Banque de Paris* v. *de Naray* [1984] 1 Lloyd's Rep. 23.

CIVIL SUIT.

Ghazi Ishak for the plaintiff.

Mohideen Abdul Kader for the defendant.

Cur. Adv. Vult.

Mohamed Daziddin J. : This is an application by the Plaintiff by way of Summons-in-Chambers for final judgment against the Defendant for an order that the Defendant do forthwith pull down and remove the unnumbered premises constructed adjacent to premises No. 17B Sungai Nibong Kecil, Pulau Pinang which stands on a portion of the Plaintiff's land known as Lot 1951 Mukim 12 Pulau Pinang and for damages and costs.

The hearing of this application was originally fixed on November 1, 1979 and according to the file it was adjourned to a date to be fixed for argument in open court. Unfortunately, nothing had been done until September 1984 when the Plaintiff's solicitors wrote to the Registrar requesting for a hearing date. Then, on January 8, 1985, the solicitor for the Defendant wrote to the Registrar requesting for a two-week adjournment to enable him to get up the case as he alleged that he was not served with any notification of the hearing date earlier. I refuse to grant the adjournment simply because being the original solicitor/counsel in this matter it is no excuse for him not to have prepared and got up the case earlier. At any rate, I find that the issue involved is not a difficult one.

The Plaintiff's application is supported by an affidavit of En. Ahmad bin Awang, the executive secretary of the Plaintiff affirmed on September 8, 1979. The Defendant, on the other hand, affirmed an affidavit in reply on October 30, 1979, supported by another affidavit of his mother, Be bte. Mat Esa, which was affirmed on even date.

The issue here is whether or not there is a triable defence. This simply means that it is for the Defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable grounds of a *bona fide* defence (See: *The Supreme Court Practice 1985* Vol. 1 – "Defence showing cause" at p.137.)

The basis of the Plaintiff's claim is that the Defendant is a trespasser by wrongfully erecting the unnumbered premises on part of the Plaintiff's land. The Defendant has denied this in his statement of Defence date July 28, 1979. He averred that he constructed his premises on a portion of land which belonged to his mother, Be bte. Mat Esa. The Defendant had set out the circumstances how the mother became the owner of a portion of the said land in his affidavit affirmed on October 30, 1979. The same averment was repeated in the affidavit of the mother affirmed on even date. She stated that she gave consent to the Defendant to construct the premises on a portion of her land which she purchased from the Plaintiff.

Based on the facts deposed in these two affidavits, I am compelled to ask myself whether this is the truth. I shall start off by considering the several documents exhibited to the affidavit of En. Ahmad bin Awang affirmed on September 8 1979. First, I find as a fact that Lot 1951 Mukim 12 has an area of 15.1217 acres and at the time of the issue of the Grant on April 2, 1979, the category of land use was "building". The land has not been subdivided. Secondly, from the survey plan made by Syarikat Ayob, it was found that the Defendant's premises was constructed on part or portion of the Plaintiff's land. There was nothing to indicate on this survey plan that the said premises was built on the portion which the Defendant's mother had alleged to have been alienated to her by the Plaintiff. Thirdly, I am satisfied that the Defendant's mother is not the registered proprietor of any of the portion of land (which has remained undivided until today) belonging to the Plaintiff. However, I am equally satisfied that she is a member of the Plaintiff's co-operative society and according to the statement of account for 1978, she had paid a deposit of $546.00 for a plot of a building site on the Plaintiff's land. Lastly, based on the correspondences as exhibited, it does seem clear to me that the Defendant had built the said premises illegally and upon refusal by the Plaintiff to allow the Defendant to continue staying on the said land, the Defendant made a desperate appeal on compassionate ground. En. Mohideen Abdul Kader, counsel for the Defendant in his submission had contended that it was open to the Defendant at the trial to adduce oral evidence to explain the circumstances in which these letters were written.

However, in my opinion, this is essentially a case where the triability of the issue depends upon evidence as opposed to law. The facts and circumstances as deposed and found in the affidavits filed therein are sufficient to settle the issue. Here I would adopt the statement in the judgment of Ackner L.J. in *Banque de Paris* v. *de Naray*[1] to the following effect:

> "It is of course trite law that 0.14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant's having a real or *bona fide* defence."

Thus, from the facts and circumstances of the case as a whole, I am satisfied that the Defendant has failed to show a *bona fide* defence to the claim. Therefore, I make an order in terms of Prayers 1, 3 and 4 of this application.

Order accordingly.

Solicitors: *Presgrave & Matthews; Mohideen Abdul Kader.*